

---

---

IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

---

**WILLIAM HANLEY**  
APPELLANT

vs.

**THE PACIFIC LIVE STOCK COMPANY**  
a Corporation  
APPELLEE

---

**Brief for the Appellant Hanley  
Opposing the Petition for Rehearing**

---

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF OREGON FROM THE DECREE  
ENTERED AUGUST 3, 1915

---

**C. E. S. WOOD  
LIONEL R. WEBSTER  
ERSKINE WOOD**

Attorneys for Appellant

**M. M. MATTHIESSEN**

With them on the Brief

**EDWARD F. TREADWELL  
WIRT MINOR**

Attorneys for Appellee

**Filed**

DEC 22 1916

**F. D. Monckton,**



# United States Circuit Court of Appeals

For the Ninth Circuit

---

WILLIAM HANLEY,

*Appellant,*

*v.*

THE PACIFIC LIVE STOCK COMPANY,

a corporation,

*Appellee.*

---

## Brief for the Appellant Hanley Opposing the Petition for Rehearing.

---

*On Appeal from the District Court of the United  
States for the District of Oregon, from the  
Decree Entered August 3, 1915.*

---

### ARGUMENT

Pursuant to your Honors' request we submit this brief in answer to the petition for rehearing. We understand that the only subject your Honors wish discussed is the drain ditch, and we shall confine ourselves to that.

In this brief "Transcript" means the printed record prepared by the Clerk of the District Court

at Portland, at the request of the appellant; "Appellee's Supplemental Transcript" refers to the printed record of additional parts of the testimony which the Clerk of the Circuit Court of Appeals prepared at the request of the appellee.

The petition for rehearing, as we understand it, makes two points. *First*, that this court is mistaken in regard to what the trial court found as to the necessity for using the drain ditch. *Second*, that the evidence is almost conclusive that Mr. Hanley's lands did not need drainage at the time the drain ditch was opened, because "during the very time" the drain ditch was taking thirty feet of water from the river, Mr. Hanley was using all of the water from both forks of the river to irrigate his lands.

We shall discuss these in their order.

## FIRST, THE FINDING OF THE TRIAL COURT.

The petition quotes the finding of the trial court "That during the months of March and April, 1915, *and at times when it was unnecessary to drain water from the lands of William Hanley*, the said defendant William Hanley, in violation of the terms of the said decree, permitted the head of the Hanley Drain Ditch to be open," etc.

This is the formal decree of the trial court prepared by the complainant's attorneys, on the basis of the trial court's opinion. So that we look at that opinion to find what Judge Wolverton actually held. His opinion, on pages 63-70 of the transcript of

record, deals with this matter, and while it is too long to quote, shows conclusively that his finding that the drain ditch was kept open unnecessarily was based on his other finding that Mr. Hanley was responsible for the brush at the 21 Dam and the breaks in the river bank and should have kept the breaks closed. He says in part:

“Before concluding whether this ditch was kept or allowed to remain open contrary to the spirit of the decree, it is necessary to examine in connection therewith the charges relating to Dam 21 and the cuts in the bank of the stream.”

He then proceeds to examine those charges and finds Mr. Hanley guilty of neglect in letting the brush accumulate at the dam, and in not keeping the cuts closed. And then, based on *this* finding, he concludes that Mr. Hanley was guilty in regard to the drain ditch, saying:

“Thus Hanley pleads the necessity for the opening of the drain ditch to rid his lands of the flood waters. But he himself, in my candid opinion, was responsible for the overflow of his own lands, and he cannot be heard to make a necessity for opening his drain ditch, and justify himself on that ground. He should have kept these breaks and gaps in the banks of the stream closed, or at least in very large measure. The just implications of the decree require this of him, as he is only given the flood waters to



May 5th, and water pouring through rents in the banks cannot be termed flood waters."

Your Honors then were perfectly correct when in your opinion you said: "But the court below reached the conclusion that the appellant had allowed the ditch to remain open contrary to the spirit of the decree for the reason that the appellant was responsible for the overflow of his own lands," and you were not, as the petition contends, mistaken as to the trial court's finding.

The trial court's finding means it was "unnecessary" to drain the lands because Hanley himself wrongfully created the necessity. Your Honors found that he did *not* create the necessity, and when your Honors found that, the underpinning was knocked from under the trial court's conclusion.

## SECOND POINT.

That Hanley was irrigating his lands at the very time he was draining them. In the language of the petition (p. 20) "the evidence showed that during the very time that Hanley had the head of the drain ditch open so that it would divert from the river at least thirty feet of water, he was himself diverting all of the water of the river, and of both forks, onto his land, for the purpose of irrigation. It therefore results that during the time when the Hanley land was being irrigated and all of the water of the river was being diverted for its irrigation, and that therefore it obviously needed irrigation and not drainage,

Hanley was diverting thirty feet of water from the river into the drain ditch."

This is a most erroneous and misleading statement, because it mixes up times and dates, and it mixes up lands. It says that "during the very time" that Hanley had the drain ditch open he was irrigating his lands, which is not a fact; it says that he was taking all the water of both forks of the river, which is not a fact either; and finally it ignores the distinction between low marshy lands, and higher meadow lands, which often makes it necessary to drain the low, while at the same time irrigating the high.

First, as to the times and dates. When the spring came and the ice in the channel broke up and the channel cleared, Hanley ordered the headgate of the drain ditch closed. (Transcript, pp. 194, 280.) It was early in April he ordered manure and stuff thrown against the boards so as to actually stop all water going through the drain ditch (Transcript, pp. 196, 288). Ryan put the additional boards in on the fifth of April, was gone one or two days, came back, found an undercurrent going under the boards, and threw in manure and stack bottom, and stopped the leak entirely. (Transcript, p. 288.) This would be, then, the seventh or eighth of April. Griffing, the *complainant's* engineer and star witness, admits that the last time he saw any water going through the headgate was *April 8th* (Transcript, pp. 100, 116), and Ben Newman, the *complainant's* ranch foreman, states, the same as Hanley's man Ryan,

that the headgate was closed tight by throwing hay and stuff against the boards on the 7th or 8th of April (Transcript, pp. 175, 177, 181).

*It may therefore be taken as conceded that by April 8th the headgate was closed tight and no water at all was going down the drain ditch.*

With this date in mind, then—April 8th—let us see when Hanley first commenced irrigating.

He did not commence irrigating from the Fennimore Dam, down on section 3 lower down the river, until “about the middle of April.” This is testified to by Ryan, who was the man who actually operated the Fennimore Dam. (Transcript, p. 290, especially lower half of page.) This is confirmed by the date of the photograph of the Fennimore Dam taken by Mr. Griffing to show that it was being used—which date is April 14th. (Complainant’s Exhibit 6.—See date on back.) And remember that Mr. Griffing is the *complainant’s* witness who early in April (many of his photographs were taken on the 8th of April) was instructed to gather evidence for this contempt proceeding. He was up and down this river constantly, and it is reasonable to suppose that if he had seen the Fennimore Dam in use earlier than April 14th he would have photographed it. This irrigation from the Fennimore Dam, then, is twenty-five days after March 20th when McLaren put enough boards into the headgate of the drain ditch to make the river overflow its banks (Transcript, p. 280), (and it does not seem as if there would be any use in putting in any more, because when the



water overflows the river banks, part of it, at least, drops into the drain ditch anyway). This irrigation from the Fennimore Dam is *nine days* after April 5th, when Ryan put all the boards in the drain ditch headgate, and it is *six days* after April 8th, when everybody admits the leaks through the boards of the drain ditch were sealed up with manure and old hay, and every drop of water was shut out of the drain ditch.

Next take the 31 Dam, sometimes called the Luig Dam. The only evidence that the writer can find in the entire record as to the date of its use is that it was being used on *April 24th*—*sixteen days* after the drain ditch headgate was plugged up so tight there was not even a leak through it. I refer to the testimony of Mr. Griffing (Appellee's Supplemental Transcript, p. 8), and of Mr. Treadwell (Transcript, pp. 147-148).

The only other place counsel can have in mind when he says that "during the very time" Hanley had the drain ditch open, he was using all the water of both forks of the river for irrigation, is the Upper Hanley Ditch; so we turn our attention to that.

And the first thing to notice is that there is no evidence that any water was going down it earlier than "the first part of April." The testimony of Mr. Griffing is the testimony that goes back the furthest in dates on the running of water into this ditch, and the earliest he places it is "the first part of April." (Transcript, bottom of p. 94, top p. 96, middle p. 126, and p. 135.) It is true that on page

94 he says the water was running into the ditch from "the first of April up until the first of May—3rd of May"; but his other testimony makes it clear that he means here not the first *day* of April, but merely the first *part* of the month. For example, on page 96 he says it was "about the first part of April," and on page 126 he says again that the first time he saw the brush in the 21 Dam was "in the first part of April." All of which is confirmed by the fact that he did not get his instructions to gather this evidence until "the first part of April" (Transcript, p. 135). The photograph he took of the 21 Dam appears to have been taken April 8th, (Transcript, p. 127). Yet this is the very day that the drain ditch headgate is conceded to have been plugged up tight.

Therefore this Upper Hanley Ditch is in the same category with the Fennimore Dam and the 31 Dam. No water was taken through it "during the very time," as counsel contends, that the drain ditch was being used. Apparently Griffing took his photographs of the drain ditch and the 21 Dam on the same date—April 8th—and a few hours after he had photographed the drain ditch Hanley's man came along and plugged the leaks in the drain ditch tight with the old hay and stuff. So that it is possible that for a few hours on that day water was leaking through the drain ditch headgate, simultaneously with the running of water into the Upper Hanley Ditch. But this, if true, lasted but a few hours. And remember that an honest and practi-

cally successful effort was made by Ryan to close the drain ditch on April 5th—three days before this time.

Parenthetically we would like to interject here an observation on headgates, and the difficulty of keeping them absolutely tight. It is known to every irrigator to be a difficult thing to do. The pressure of water against a gate is tremendous, and almost invariably there is some leak, either through the wings of the gate, underneath it, or through the boards, if they are not jammed down tight, which is sometimes hard to do. Modern irrigation engineers recognize this, and most headgates now in large projects are made of cement, with gates raised and lowered by screws. But Harney Valley is still a pioneer country. It is only within the last year that a railroad has penetrated to the rim of the valley, and it is still thirty miles from Burns. All of the gates in that valley are made of timber, just exactly like the headgate of the drain ditch, and the difficulty of keeping them absolutely tight is ever present. That Hanley has tried to do so is shown by the fact that he built a new headgate at the drain ditch the fall before this proceeding was commenced, and when that leaked he threw the old hay and stuff in in front of it to make it tight.

To conclude this phase of the discussion then, there is no evidence anywhere that Hanley was diverting water from the river for irrigation "during the very time," in counsel's phrase, that he was taking water out through the drain ditch. Indeed

the evidence is quite the contrary, and is to the effect that he was not irrigating anywhere until *after* the drain ditch was closed.

Furthermore, there is no evidence anywhere, that I know of, that any of the water going down the Upper Hanley ditch was being used for irrigation. This is perhaps not so important, since, by straightening counsel out on the dates, we have demolished his contention that Hanley was irrigating and draining at the same time. Nevertheless, since his argument is based on the assumption that Hanley was *irrigating*, we say that, as to the Upper Hanley ditch, there is no evidence that he was irrigating at all. He may have been irrigating, he may have been running the water there for stock water, or he may have been using it to wash alkali off some land on the eastern side of his ranch that is alkalied and he is reclaiming to meadow, or he may have had some other reason which we do not know. But that he was irrigating is pure supposition.

It is well to bear in mind his right to have water run down the Upper Hauley ditch at *any* time and for *any* purpose, when it will flow there without the aid of the 21 Dam. The decree is:

“If at any time and while the dam of the said W. D. Hanley is open so that it does not obstruct the flow of the water in said river and from natural causes the waters of said east fork of Silvies River shall \* \* \* naturally run through either of the ditches of the said

W. D. Hanley leading from the dam of the said W. D. Hanley first above described, said defendant W. D. Hanley shall have the use and enjoyment of so much of the said water of said river as may come upon his land in the manner aforesaid and during such time as the same may run thereon from natural causes and without any obstruction of the channel of said river."

We now come to our discussion of the other fallacy in the complainant's argument—namely, the fallacy of mixing up the lands. Complainant says: "Hanley was irrigating; therefore, by his own act, he has proved he didn't need drainage." This argument assumes that if any one piece of land of all the ten thousand acres of the Hanley ranch is being irrigated, it necessarily follows that all the rest of the ten thousand acres need irrigation likewise, and therefore it is impossible that any of it should need drainage. Hence, if any irrigation was going on at any part of the ten thousand acres at the same time that the drain ditch was being used on another part, it is, according to complainant, conclusive evidence that the drain ditch was being used in violation of the decree. To state this proposition is to refute it. Nevertheless, we shall go further and dissect it a little. Let us forget, for a moment, what we have said about the dates, and assume that irrigation was actually going on at some parts of the ranch at the same time the drain ditch was open. Where was this irrigation? Counsel points out three places.



The 31 Dam, the Fennimore Dam, and the Upper Hanley Ditch—*every one* of them serving lands of a different character than the drain ditch lands. The 31 Dam is even on a different fork of the river. The lands irrigated from these sources are lands that have always been *meadow*; they are *higher* lands. Section 31, on the west fork, is one of the oldest hay sections in Harney Valley. Stenger built his dam to irrigate it in '87 (Transcript, p. 186). The same with the lands along the Upper Hanley Ditch, they are higher meadow lands. Originally they were partly meadow and partly sage brush. The same with Section 3, served by the Fennimore Dam. It is, and always has been, a meadow section. The very presence of the dams and ditches to irrigate these lands shows that they need irrigation, not drainage,—that they are, and were originally, meadow lands.

But what about the drain ditch lands—the southeast part of 27, the southwest part of 26, and all of 35? This record is crammed full of testimony that they are a *basin*, a *shallow saucer* in the inclined plane of Harney Valley as it slopes to the southeast, and that they were originally a *tule marsh*, entirely unproductive until the drain ditch was built along the northern rim of the saucer to divert some of the river around the saucer and return it to the river *through* Embree Slough, and thus keep the saucer partly dry. *Then* the saucer began to make hay. But it needs *drainage*, and it needs it while other lands need irrigation. The

record is full of references to this fact that this land was a tule marsh. (Transcript, pp. 196, 158, 162, 163, 166.) But it is nowhere better expressed than in the words of *complainant's* own superintendent, Mr. Gilcrest: "That is a basin—the lowest depression in that whole territory—34 and 35." (Transcript, p. 163.)

To say, then, that because irrigation is going on in some other part of Harney Valley, is conclusive proof that it was unnecessary to use the drain ditch, is illogical. It is missing the distinction between different kinds of lands.

#### THE CHARGE THAT HANLEY WAS TAKING ALL THE WATER OF THE RIVER.

It really is not necessary to discuss this. But we touch it lightly in passing just to show the inaccuracy of the statements in the petition for rehearing. The statement is that "during the very time that Hanley had the head of the drain ditch open so that it would divert from the river at least thirty feet of water, he was himself diverting *all of the water of the river* and of both forks onto his land for the purpose of irrigation."

We have shown, in straightening out the dates, that at the time Hanley had the drain ditch open, he was not diverting any water at all *anywhere* for the purpose of irrigation. But pass that by. Let us go forward to that later date, after the drain ditch was closed, when Hanley *was* diverting

water. How much was he diverting? We will take Griffing's own figures—forty-two second feet at 31 Dam (Appellee's Supplemental Transcript, p. 9); forty second feet into the Upper Hanley Ditch (Transcript, p. 94); and an indeterminate amount at the Fennimore Dam, which Hanley's men got part of the time, and the complainant's men got part of the time (Transcript, p. 290). This makes seventy-one second feet, plus the indefinite amount at the Fennimore Dam, which Hanley's men and the complainant's men were unwillingly sharing with each other. (We omit the breaks in the banks because they were not diversions and Hanley was trying to stop them.) The foregoing figures are Mr. Griffing's. Yet during this period Griffing says the flow of the river averaged *four hundred and twenty-eight second feet* (Appellee's Supplemental Transcript, p. 7). And of this amount the complainant itself was getting *ninety second feet* at one place alone—the Orphan Ditch (Transcript, p. 108). This was water partly diverted through the Orphan Headgate and partly coming from the breaks in the river bank and the overflow in Section 27. And the complainant carried it westward and used it on its own Sections 33 and 4 (Transcript, pp. 165-166), and thence it went into Chapman Slough and was used by the complainant again.

And indeed it is important to remember that nearly all water that gets out of the river banks on the upper reaches of the river, whether by overflow or diversion, comes back onto the complain-

ant's lands below and is used by it. Even the water that goes through the drain ditch is used by the complainant on Sections 26 and 36, before it has gone down the ditch a mile, and when it is dropped into Embree Slough it goes back into the river again only about six miles below where it was taken out. (Complainant says sixteen miles [see petition for rehearing, p. 23], but consult the map attached to the transcript in this appeal.) And while this six-mile point is below complainant's Mace Dam, yet it is above complainant's other points of diversion, and above the main body of complainant's lands.

So that when complainant speaks about others taking "all the water of the river" it is well to accept the statement with reserve.

A few miscellaneous observations yet remain.

The decree gives Hanley the right to use the drain ditch whenever it is necessary to drain water from the surface of his lands. Mr. Griffing makes one statement which, of itself alone, is sufficient to exonerate Mr. Hanley in this whole matter, and that is that at the very time the water was going down the drain ditch, the river was overflowing the banks and flooding Section 27 east of the river and Section 35. Griffing says:

"Q. Was there any water down on 35 at that time, below the drain ditch and in 27?

"A. Yes, some.

"Q. Overflowing the banks there, wasn't it,

covering a good deal of 35, and part of 24 (27) east of the river?

“A. Yes, water was overflowing the banks there.”

(Transcript, pp. 115-116.)

If Hanley wants to keep the water off these lands and cannot use the drain ditch to do so, under the conditions just narrated by Mr. Griffing, then when can he use the drain ditch?

It is stated in the petition for rehearing (p. 23) that Hanley took the position in his sworn affidavit that he had not diverted any water during the period in which it afterward appeared he had diverted water. This is hardly a fair statement either as it seems to us. His position was that after talking with his counsel in Portland “about the middle of March,” he returned to Harney Valley and ordered the drain ditch closed and it was done, even though in so doing he suffered great damage by overwatering his low lands. He did not in his affidavit state any definite date when the drain ditch was absolutely closed. He said it was after discussing the matter in Portland with C. E. S. Wood “about the middle of March.” His actual language is (Transcript, p. 32) “about the middle of March I consulted with one of my counsel, Mr. C. E. S. Wood, as to what could be done to remove all cause of complaint against me by the Pacific Live Stock Company and if possible to start the commencement of a neighborly feeling, and



after such consultation I returned to Harney Valley and gave instructions which were carried out, that the head of the drain ditch was to be sealed water tight," etc. It is true that later on in the affidavit (p. 38 of the Transcript) he says that "about the middle of March, after talking with counsel, C. E. S. Wood, in Portland," the drain ditch was closed tight. But this is only an approximation of time: "about the middle of March" was purposely used because he did not know the exact date. And taking the language as a whole it is apparent what he means is that he *consulted with counsel in Portland about the middle of March*, and then returned home and gave his orders. Is this inconsistent with the facts as they appeared at the trial, namely, that McLaren put boards in the headgate about the 20th of March enough to flood the water over the banks? And that Ryan was ordered by Hanley early in April to take no chances but to put all the boards in and throw stack bottom and manure against them, which he did on the 5th and 8th of April? Is there such a discrepancy in time between consulting his counsel in Portland "about the middle of March" and closing the drain ditch tight on the dates stated in April as to warrant the contention that Hanley took a position in his affidavit which the proof at the trial rendered untenable? Especially when you consider the circumstances under which the affidavit was drawn—Hanley, all unsuspecting, served in Portland with an order to appear and show cause at a date only

a few days off, the necessity he was under to return to Burns, and so, in doubt whether he could get back in time to appear in person, the affidavit drawn hurriedly by C. E. S. Wood. As Hanley says in the affidavit itself—"I am making this affidavit now away from Burns and sources of information because of the short time in which I am allowed to appear and show cause." (Transcript, p. 43.)

It is stated in the petition for rehearing (p. 23) that "on the trial of this case Hanley did not claim that during this period it was either necessary or proper for him to divert water through the drain ditch."

This is really incomprehensible to the writer of this brief; for Hanley claimed not only that it *was* necessary for him to divert water through the drain ditch, on account of the cattle he was feeding on 27 and 35, but that after that, it was very necessary and proper to divert water down the drain ditch, and to do so would have benefited his lands greatly, but that he, following his deliberate program of conciliating the Pacific Live Stock Company, chose to forego his right and close the drain ditch, and thereby he suffered a great detriment in the excessive watering and overflowing of his low lands. (Transcript, pp. 37-38, 193-198, especially 196, and 258). And anyone who doubts his statement need only look at the photograph Mr. Griffing took of the water standing a foot and a half deep on Section 27 on April 20th (Complain-

ant's Ex. 23; see also Transcript, p. 109), and need only remember Mr. Treadwell's statement that on April 18th the lower part of Section 27, where he stood with Mr. Hanley, was "a sea of water." (Transcript, p. 144.)

So we say it is incomprehensible to us to state that "on the trial of this case Hanley did not claim that during this period it was either necessary or proper for him to divert water through the drain ditch."

In conclusion we wish to emphasize that Mr. Hanley, so far from using this drain ditch in violation of the decree, was making every effort not to use it so, and was willing to suffer injuries to his low lands and forego his right to use the ditch if he could only get on a friendly basis with his neighbor, this complainant. This seems such an obvious fact in this record, and it ought to be so controlling in deciding whether there was any violation of the decree or any intent to violate it, that we dwell on it a moment in closing. Look what Mr. Hanley did—and none of it is disputed. He consulted his counsel as to the best way to remove friction with the Pacific Live Stock Company. He goes to San Francisco to see Mr. Treadwell, for the purpose of taking the matter up with him and trying to reach a harmonious working arrangement. He gives positive and specific orders to keep the drain ditch closed, and even goes to the length of ordering the old hay and stuff thrown in, so there will not be any leaks. And pursuant to these

orders the headgate is closed tight during all the flood season, so that the Pacific Live Stock Company can get the flood waters they so much desire, even though this results in over-watering Hanley's lands. Remember in this connection that the whole theory of the stipulations on which the original decree was entered, was that if the Pacific Live Stock Company could get the floodwaters it was satisfied. Even, therefore, if the headgate were not closed water tight till April 8th, Hanley had reason to suppose that if it were closed then, in time to send the floodwaters on to complainant, the complainant would be satisfied. His keeping it closed during the flood, to the detriment of his own low lands, is rendered still stronger evidence of his desire to get along peaceably with the complainant, when you remember that the flood on his low land was increased by the Orphan Ditch levee backing the water over this low land, and that Mr. Hanley regards this Orphan Ditch levee and consequent backing of water over him as the most flagrant violation of his rights by the complainant. Yet notwithstanding the provocation this gave him, he did not open his drain ditch to relieve against it. Instead he took Mr. Treadwell down past the drain ditch to the Orphan Headgate on April 18th and showed him the conditions (Treadwell, Transcript pp. 143, 144). Is not that evidence of his trying to get on peaceably with this complainant? And that is not the end of his efforts. A week later, April 25th, a Sunday, he went down

to the Island Ranch—the Pacific Live Stock Company's headquarters—to see Mr. Treadwell. (Transcript, p. 147.) It was the first time he had “been on this ranch for twenty years, by invitation” (Transcript, p. 211)—a place that for years had been unfriendly to him, yet he went in pursuance of his determination to make a peace.

None of these things are disputed. Mr. Hanley's frame of mind is apparent from them. And it is unbelievable that a man in that frame of mind would have used the drain ditch at a time when it was unnecessary to do so. That would be contrary to his whole intent, and would upset his whole plan of conciliation. It would have been a crude blunder,—and Mr. Hanley is not a blunderer.

Finally, we should like the court to know that despite the failures of the past, and on the renewed invitation of Mr. Hanley, the parties to this controversy are now mutually engaged in striving to reach a settlement of their differences and to live henceforth in a peaceful and more neighborly understanding.

Respectfully submitted.

C. E. S. WOOD,  
LIONEL R. WEBSTER,  
ERSKINE WOOD,

*Attorneys for the Defendant and  
Appellant William Hanley.*



